SUPREME COURT, U. S.
JAN 21 1974

Supreme Court of the United States

October Term, 1973

No. 73-1135

LLOYD WILLIAM SAHLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Supreme Court of the United States

October Term, 1973

No. .....

LLOYD WILLIAM SAHLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 26, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, and is printed as Appendix A, *infra*, pp. 13-15.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 16) was entered on December 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

(A) 26 U.S.C.A., 7203. Willful Failure to File Return, Supply Information, or Pay Tax

Any person required under this title to . . . make a return . . . who willfully fails to . . . make such return . . . at the time or times required by the law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(B) 28 U.S.C.A., 1732. Record Made in Regular Course of Business: Photographic Copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

QUESTIONS PRESENTED

I. When a defendant is charged with willful failure to timely file income tax returns, does a trial court err in forbidding defendant to testify to the advice given and statements made to him by an accountant, when such statements were offered solely as evidence of good faith, the

frame of mind of defendant, and lack of willfulness ensuing?

II. When a defendant is charged with willful failure to timely file income tax returns, does a trial court err in admitting into evidence testimony of his spouse's income during the relevant period, if a joint return is later filed?

III. Did the trial court err in admitting into evidence a photocopy of a purported statement of a corporation allegedly found in the office of another corporation without any proof that the original was prepared, or kept in the regular course of business, and without proper authentication thereof?

STATEMENT

Petitioner was convicted on a three count information in the United States District Court for the Northern District of Ohio, Eastern Division for failure to timely file income tax returns for the years 1965, 1966, 1967. He was sentenced to serve a one-year term, with 60 days to be served in jail and the balance on probation. A fine of $2,000 was also imposed.

I.

Central to the defense was the contention that petitioner's failure to file timely was not "willful". The bedrock upon which that defense rested in large part was that he had relied upon the advice, and his conversations with his C.P.A., one Collier. Collier, a Government witness, admitted that he had made a preliminary investigation, and given petitioner preliminary opinions that he did not need to file in all three years because of the agreement between the petitioner and one Dennis, although his letter to pe-

titioner (Dx 3) indicated that he would have to do a great deal of work in order to finalize that opinion, and demanded $5,000 in advance (as well as a past indebtedness of $1,000), before he would begin. On redirect, Collier maintained his position that all the receipts of Sahley during 1964-1967 were likely not income, but equivocated stating that he had not seen everything, and that the I.R.S. might not agree with him.

Petitioner Sahley (787A) attempted to inform the jury of Collier's advice to him. On objection, the Court was advised that it was petitioner's position that Sahley to prove his frame of mind had a right to testify what Collier had advised him, i.e. effectually that he did not need to file (783A1, *et seq.*). *The Court ruled, however, that Sahley could not tell what Collier told him; merely that Collier had given him some advice, and that he acted on that advice* (786A1).

The letter of Collier to Sahley read in pertinent part: "You have asked me for assistance in filing your personal income tax returns for the years 1965, 1966 and 1967. As I told you last year, pertaining to 1965 and 1966, after a review of your records and your agreements with Mr. Dennis, it appears to me that all income was corporate, and you personally probably had no real income for those years. Since, per your agreement, you owe Mr. Dennis all of this money on notes, *no returns would be required.* However, before I would commit myself absolutely with IRS we would have a lot of work to do on your books. We would absolutely require an advance payment of $5,000 in cash or certified check before we could start the work. I believe a small amount of around $2,400 may have been reported on W-2's for last year, which I gave to your bookkeeper to send in. This can be corrected by amendment when we finish our auditing work." (emphasis added)

After being out for some time, the jury informed the Court that it was hung on two counts, which it couldn't resolve, "by either having the availability of the testimony or any of the evidence which we have with us" (1066-1067A). Told by the Court to submit a written question the jury asked: "*With the agreement between Sahley and Dennis, Defendant's Exhibit 3, and Collier's letter, Defendant's Exhibit 2, was Sahley advised by Collier that he did not need to file a return for 1965, 1966?*" (1068A). The Court did not answer the question: he had forbidden Sahley to answer that very question; but instead, caused to be read portions of the testimony of Sahley and Collier to the jury (1070A-1180A).

II.

Over objection, the Government was permitted to introduce evidence that petitioner's wife, Mrs. Sahley, had received certain income (394A, 402A, Rec'd. 403A) during the relevant period. The amount received by Mrs. Sahley alone would have required her to file a return.

III.

During cross examination of defense witness Robert Dennis, the Prosecutor attempted to examine him with respect to Gx 77, a pro forma consolidated balance sheet of several of his and Sahley's corporations. When Dennis could not identify the exhibit, and indeed, had no recollection of it at all (674-77A), the Court permitted the Government to recall Mr. Relic, the chief investigator for the Government, who claimed that Gx 77 was a photocopy of an original he had seen in the New York offices of a New York company called Real Estate Capital, and that the photo was made for him during his investigation in New York (679-82A). Miss Stiven, secretary to the President of Real Estate Capital testified both in Court (282A-294A), and later, after her return to New York, telephonically

(712-18A; 721-24A; 752-53A), that she made full examination of the files and was unable to find any such document in the files of Real Estate Capital. Nonetheless, the trial court admitted the exhibit. Dennis did identify his signature on the face sheet of the exhibit, admitted that he wouldn't sign anything unless at the time he believed it accurate, but couldn't say if the signature sheet was annexed to the sheets following it in inception.

REASONS FOR GRANTING THE WRIT

I.

The Trial Court Erred in Its Exclusion of the Testimony by Defendant of the Advice Given, and the Statements Made to Him by His Accountant Collier to Show Defendant's Frame of Mind.

It has always been held that a defendant may testify as to utterances made to him by third parties, when the defendant's state of mind is an issue, as it was in the case. The importance of the excluded evidence is demonstrated by the question the jury propounded in the midst of deliberation.

The trial court held that testimony by Sahley quoting what Collier told him would constitute impermissible hearsay. The ruling was plainly wrong; WIGMORE, 3rd Ed., Sec. 1789 says:

> "Whenever an utterance is offered to evidence the state of mind ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned."

The cases and texts uniformly apply the rule whether the case be civil or criminal, regardless of the source of the statements, so long as the statements are offered to show the state of mind of the hearer, and not to prove the truth of the statements. TRACY, HANDBOOK OF THE LAW OF EVIDENCE, Sec. 1952, MCCORMICK, EVIDENCE, Hornbook Series, Sec. 1954, pp. 64-65; Courts of Appeal have uniformly followed the rule, *United States v. Brown*, 411 F.2d 1134 (1969); *Frank v. United States* (10th Cir. 1955), 220 F.2d 559, 563-564; *Buchanan v. United States* (2d Cir.), 233 F. 257, 259; *McCarty v. United States*, 10 Cir., 408 F.2d 793, 1969; *Peterson v. United States*, 10 Cir., 268 F.2d 87; *Haigler v. United States*, 10 Cir., 172 F.2d 986; *Flournoy v. Hewgley*, 10 Cir., 234 F.2d 213; *Creaghe v. Iowa Home Mutual Casualty Co.*, 10 Cir., 323 F.2d 981."

Until this case the 6th Cir. also followed the rule, *DeRonde v. Gay Time Shops* (6th Cir.), 239 F.2d 735, 739.

In this case the 6th Cir. affirms the trial court's exclusion by contending that the testimony of the defendant was cumulative! But the testimony of the defendant can never be "just cumulative", when the real issue is the frame of mind of the defendant. In such a circumstance his testimony is primary, and of primary import in the defense. To permit the exclusion of his testimony on the issue is at odds with the decisions in all circuits and fashions a new and unsound rule. See also *Miller v. United States* (10th Cir.), 120 F.2d 968, and *U. S. v. Kennedy* (2d Cir. 1961), 291 F.2d 457, 458; and *McGaw v. Ohio*, 123 Ohio St. 196; and 20 AM. JUR., Evidence, Sec. 457.

II.

The Trial Court Erred in Admitting Testimony on the Income of Petitioner's Spouse

The trial court erred in admitting evidence as to the income of petitioner's spouse. In an evasion case, if a defendant filed a joint income tax return with his spouse, willful failure to include in the joint return his wife's income would constitute a crime. That rationale is sound because the failure to include in the return any income of which the defendant has knowledge, and which should be included in the return, creates guilt, whether it is his income or his wife's that he deliberately omits. But where the charge is failure to file a return timely, the sole question is whether the defendant himself was required to file a return. If not, he is not guilty.

He is not required to file a joint return, and the fact that he chose to do so later does not alter the requirement. It was not his responsibility to file a return for his wife, and he can be guilty of no crime because of her failure to file. (The Court of Appeals failed to make any comment on this issue, raised at petitioner's brief below, pp. 34-35.)

III.

The Trial Court Erred in the Admission of Gx 77

The Court, in *Palmer v. Hoffman*, 318 U.S. 109 (1943), laid down the rule that in order for a statement to be admitted under Sec. 1732 it must be a record made in the regular course for the systematic conduct of the business as a business (318 U.S. at 113). In BARRON AND HOLTZOFF, Sec. 971, it is said that in order to be admissible a record must be shown to have been prepared as a systematic or routine procedure of the business as a business (at p. 255). Where a party seeks to introduce documents as business

records, the burden is upon him to prove that there was a systematic or routine procedure followed in the preparation and filing of such writings, *Standard Oil of California v. Moore* (9th Cir. 1957), 251 F.2d 188, 215, cert. den. 356 U.S. 975. The test of admissibility under 28 U.S.C. 1732, is the regularity of the business practice in making such a record, *Smith v. Bear* (2d Cir. 1956), 237 F.2d 79; *Matthews v. United States* (5th Cir. 1954), 217 F.2d 409; *Clainos v. United States* (D.C. Cir. 1947), 163 F.2d 593. The nature and the source of the record must be demonstrated, i.e. how and when it was prepared, and how it came to be a portion of the records of the company. It must be shown under whose supervision, and pursuant to what circumstances the record was prepared. Reports not shown to be prepared under the supervision or control of any employee or officer of a company, or records whose trustworthiness cannot be established by testimony of any person who systematically kept or supervised the records of the company, cannot be held to be business records within the meaning of Sec. 1732, *United States v. Martin* (D.C. Ill. 1958), 167 F. Supp. 304.

While there has been a relaxation of the common law rigidity which required production of the preparers and informants, yet the records must "be verified by a supervising officer who can testify that they had been regularly kept". McCORMICK, EVIDENCE, Hornbook Series, Sec. 288, at p. 606. The lead case is regarded as *Massachusetts Bonding and Insurance Co. v. Norwich Pharmacal Co.*, 18 F.2d 934 (2d Cir. 1927), wherein Judge L. Hand ruled that in order for a document to be admissible there must be shown to have been a preparation under a routine which warrants reliability.

But all that investigator Relic could state was that he obtained Gx 77 in New York at the offices of Real Estate

Capital. He could not testify that Gx 77 was a part of the records of that company. Assuming arguendo, that Gx 77 was a part of Real Estate's records, still Sec. 1732 requires that a party seeking to introduce records must submit preliminary evidence that the records were made in the regular course of business. *Bruce v. McClure* (5th Cir. 1955), 220 F.2d 330. In the absence of satisfactory proof of authenticity, the mere existence of a document in the file of a corporation does not, without more, render it admissible. *N.L.R.B. v. Sharples Chemicals, Inc.* (6th Cir. 1954), 209 F.2d 645.

The Court of Appeals justified admission of this document on the grounds that it was a photocopy, and that it represented "past recollection recorded" of Robert Dennis. However, there was no proof that it was indeed a photocopy of an authentic document; and far from testifying that the entire exhibit was authentic, Mr. Dennis only testified that the front page bore his signature. That page only contained a statement that the balance sheets which followed were "Consolidated Financial Statements of Affiliate Corporations owned 100% by the 'Robert B. Dennis Group' of Associates. All intercompany Assets and Liabilities have been eliminated" (1405A). But there was no evidence produced, nor did Mr. Dennis testify that the sheets which Mr. Relic had attached to that certification were indeed attached to an original.

The rule of authentication required for business records has been much relaxed in the instant case. Indeed, the case erects an entirely new rule of law with respect to the production of documents. For here the court permits to be introduced a record purporting to be a record of one company, purportedly copied from the records of different company. The mischief such a rule can work is endless. Anyone could detach a certification from certain papers,

attach it to other papers, and then give to a third person the documents; who could testify he had received them from the giver—and thereupon the documents would become admissible in evidence!

CONCLUSION

A Writ of Certiorari to review the ruling below should be issued.

Respectfully submitted,

Moses Krislov
Attorney for Petitioner

APPENDIX A

Opinion of the Court of Appeals

(Filed December 26, 1973)

No. 73-1626

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LLOYD WILLIAM SAHLEY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio

Before: PHILLIPS, *Chief Judge;* PECK, *Circuit Judge;*
*JOINER, *District Judge*

PER CURIAM: The defendant in this case was convicted on a three count information charging him with willfully failing to timely file his income tax returns for the years 1965, 1966 and 1967, each count being a violation of Section 7203 of Title 26 of the United States Code. This appeal is from the concurrent sentence on each count of one year, the first 60 days to be served in a jail type institution, and the balance of the sentence on probation, together with a fine of $2,000 on each count.

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*The Honorable Charles W. Joiner, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Five issues were presented to the court for decision. None of these presented grounds for reversal. Therefore, the judgment of the trial court is affirmed.

1. Did the trial court err in excluding testimony of the defendant of advice given him by his accountant as to the need for filing such returns? The testimony of the defendant was cumulative of other evidence in the case. The opinion of the accountant, confirming an earlier oral opinion, to the effect that the income received was not that of the defendant was read to the jury. The evidence is without contradiction that the defendant acted in accordance with this opinion and did not file a return for the three years in question. The court fully instructed on the issue of willfulness and told the jury that the defendant could not act willfully if he in good faith believed the income not to be his. The refusal to receive in evidence, in the absence of an offer of proof that the testimony would show different advice than that shown by the letter, twice read to the jury, was not prejudicial. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Billingsley*, 440 F.2d 823 (7th Cir. 1971), cert. denied, 403 U.S. 909 (1971).

2. Was it error for the trial court to receive in evidence a photocopy of a summary statement without proof that the original was prepared and kept in the regular course of business by the defendant? The exhibit was in the form of a photocopy and thus for this reason a duplicate, and not inadmissible because it was not the best evidence. Proposed Federal Evidence Rules 1003 and 1001(4).

The statement was offered to a witness who testified that he did not in fact have any recollection as to the substance, that he could not testify fully and accurately about the substance but that he had signed the statement and

that he "wouldn't have signed it" if it had not been accurate. The exhibit was offered by the government as past recollection recorded, and not as a business record exception to the rule against hearsay. *United States* v. *Kelly*, 349 F.2d 720, 770 (2d Cir. 1965).

3. Was the presentation of the government's case done in such a way as to unfairly prejudice the defendant? We have thoroughly scrutinized the trial transcript, and we find that none of the acts referred to by the Appellant indicates or suggests to the court that the government acted in a prejudicial manner against the defendant.

4. Did the trial court err in ruling *in limine* that no evidence should be produced with respect to the prior criminal case against the defendant? It is quite appropriate for the trial judge, when he ascertains either in advance of trial or in the process of the trial that certain matter will be gone into by one party, to indicate the propriety of such evidence, and if the matters are not proper to rule that the matter should not be gone into. This practice prevents juries from hearing parts of inadmissible evidence. The court ruled that he would sustain the objection of the government to the development of this subject matter. Apparently nothing developed and no further objection was made. The ruling was proper.

5. Was the evidence sufficient to support the verdict? The record contains evidence upon all the elements of the case and supports the verdict of the jury. *United States v. Glasser*, 315 U.S. 60 (1942).

Judgment is affirmed.

APPENDIX B

Judgment of the Court of Appeals

(Filed December 26, 1973)

No. 73-1626

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LLOYD WILLIAM SAHLEY,
Defendant-Appellant.

Before: PHILLIPS, *Chief Judge*, PECK, *Circuit Judge*, and JOINER, *District Judge.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1973

LLOYD WILLIAM SAHLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1135

LLOYD WILLIAM SAHLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of willfully failing to file income tax returns for the years 1965, 1966, and 1967, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. He was fined $2,000 and sentenced to concurrent terms of 60 days' imprisonment in a jail-type institution and to probation for the balance of one year. The court of appeals affirmed (Pet. App. A). Petitioner here challenges the admission and exclusion of certain evidence at trial.

The government showed at trial that petitioner had received gross income from business activities of approximately $63,000, $40,300, and $39,700 during the three years in question (I. R. 7A-9A; II R 450A-

453A).[1] Petitioner presented two alternative defenses at trial. His principal contention was that the business receipts in question did not constitute gross income but rather were loans which he was liable to repay (see, *e.g.*, III R. 996A-1026A). His secondary contention was that even if the receipts in fact were gross income, he had in good faith believed that they need not be reported as such (see, *e.g.*, III R. 1027A).

Testimony about the advice given to petitioner by his accountant was introduced as to both defenses. The accountant testified that he had advised petitioner that the receipts in question were "probably" not taxable income (II R. 425A) and that it "looked as though" petitioner would not be required to file returns (II R. 408A). A letter which the accountant had sent petitioner with respect to the taxability of the receipts and the necessity of filing a return was read to the jury twice—once by the accountant (II R. 406A-407A), and once by petitioner (III R. 801A-803A). Petitioner further testified that he had discussed his tax situation at length with his accountant (III R. 792A-801A) and had relied upon his accountant's oral and written advice in not filing tax returns (III R. 803A). Petitioner was not permitted to testify as to the substance of the oral advice given him by his accountant (III R. 788A to 786A-1), but he had made no offer to prove that the oral advice was different in any way from the written advice contained in the letter which was read to the jury.

Petitioner's claim throughout the trial was that the receipts in question were loans from a group of corporations controlled by Robert Dennis, who testified for

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[1] "R." refers to the four volume record appendix filed in the court of appeals.

the defense. Upon cross-examination, the government introduced a copy of a corporate financial statement (Gov. Ex. 77; II R. 682A, 684A), which did not indicate the existence of any such indebtedness.[2] Dennis acknowledged that the copies bore his signature as president of the corporations, that he had caused the statements to be prepared, and that he would not have signed an inaccurate financial statement (II R. 675A-676A).

The government introduced a work sheet summarizing petitioner's gross income for the years in question, which included $3750 received by his wife as income in 1967 (I R. 249A; IV R. 1345A). The Form W-2 indicating her income was also introduced in evidence as part of a composite exhibit of Forms W-2 pertaining to both spouses (II R. 403A).

1. The trial court, in rejecting petitioner's testimony as to the substance of the oral advice allegedly given by his accountant, apparently determined that such testimony was being offered as part of petitioner's principal defense, *i.e.*, to show that his business receipts were not taxable, and that for that purpose it was inadmissible hearsay. We of course concede, as we did in the court of appeals, that the testimony was admissible on the issue of willfulness. However, we believe that the court of appeals was correct in holding that, in view of the cumulative nature of petitioner's

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[2]The original statement could not be located in the corporate files at the time of trial (II R. 752A). A government agent testified that the copy introduced in evidence had been made from the original in his presence at the corporate offices (II R. 679A-680A). This constituted sufficient authentication. IV Wigmore, *Evidence* (Chadbourn rev.) §§1192, 1265, 1280.

offered testimony, which apparently would merely have reiterated the substance of the accountant's own testimony, including the letter which had already been read into evidence, petitioner was not prejudiced by the trial court's ruling. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 230-231.[3]

2. The copy of the corporate statements was introduced not as a business record, as petitioner contends (Pet. 8-11), but as "past recollection recorded" (II R. 676A). It was properly admitted in evidence for that purpose. See, *e.g.*, *McGarry* v. *United States*, 388 F. 2d 862, 869 (C.A. 1), certiorari denied, 394 U.S. 921; *United States* v. *Kelly*, 349 F. 2d 720, 770 (C.A. 2).

3. Petitioner did not object to the introduction of the work sheet which showed his wife's income, but only to the admission of the composite exhibit of Forms W-2 pertaining to both his own income and that of his wife. Petitioner's own Forms W-2 were clearly admissible, and it does not appear from the record that petitioner's objection was directed only at the portion of the exhibit pertaining solely to his wife's income. In any event, since petitioner and his wife had consistently filed joint returns in prior years (see, *e.g.*, Gov. Ex. 34, IV R. 1290A *et seq.*), proof of her income during the years in question was relevant to the question whether his failure to file had been willful.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[3]There is no conflict here with *Miller* v. *United States*, 120 F. 2d 968 (C.A. 10), or *United States* v. *Kennedy*, 291 F. 2d 457 (C.A. 2), neither of which involved a question of cumulative testimony.